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FORESEEABILITY APPROACH IN STATING RULES---WHEN LOGIC DEMANDS ABANDONMENT

REYNOLDS C. SEITZ*

Problem Illustrated by Analysis of Agent's Tort Responsibility to Third Persons as Outgrowth of Agent's Negligent Performance or Failure in Duty to Principal.

A MASS of legal literature has congested around the foreseeability concept. A host of writers¹ have pointed out that the foreseeability philosophy can be and has been expanded or contracted to suit the courts particular attitude toward justice within the law. That such is actually the situation cannot be denied and oftentimes should not be too much deplored. It would not seem wise to object to the fact that there is, as Professor Llewellyn puts it, "Enough leeway and give within the framework of our law to allow of what is felt as justice being attained in a case without departing from that framework."² It does, however, seem illogical that rules should be stated in such a manner as to put emphasis upon the foreseeability approach when conclusions are to be reached which totally ignore the "clear view" dogmas. It will be the thesis of this article to disclose that there are occasions when the foreseeability rule should not be mentioned, and should, in fact, give ground before other controlling principles. And, in addition, to indicate that to focus attention upon foreseeability reasoning in those areas where outcomes should rest upon other foundations has actually induced some courts which abhor inconsistency to close their eyes entirely as regards "forward looking" and come to wrong conclusions based upon outworn concepts—which concepts, however, omit reference to foreseeability and therefore permit evenness of decision.

To illustrate the basic proposition just set forth a problem has been selected from the agency—tort field. Specifically, attention will be directed to the agent's tort responsibility toward third persons in the event he negligently performs or fails to perform a duty to his principal. The majority rules which cover this field can be most accurately and succinctly stated by referring to three sections of the *Restatement of Agency* which provide as follows:

- (a) "An agent who undertakes to act for the principal under such conditions that some action is necessary for the pro-

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¹ The authorities are too numerous to require citation. Perhaps Dean Leon Green has been the most forceful exponent of the idea.

² *On Reading and Using The Newer Jurisprudence*, 40 COL. L. REV. 589 (1940).

tection of the person of others or of their tangible things is subject to liability to such others for physical harm to them or to their things caused by his undertaking and subsequent negligent failure to act, if the need for action is so immediate or emergent that withdrawal from the undertaking is no longer possible without unreasonable risk to them, and the agent should so realize."³

- (b) "An agent who has the custody of land or chattels and who should realize that there is an undue risk that their condition will cause harm to the person, land, or chattels of others is subject to liability for such harm caused, during the continuance of his custody, by his failure to use care to take such reasonable precautions as he is authorized to take."⁴
- (c) "An agent who negligently performs or who fails to perform a duty to his principal is not thereby liable for harm resulting to the pecuniary interests of a third person, although the agent realizes that there is an unreasonable risk that such harm will result."⁵

To make fully clear the fact that the law just cited places emphasis upon the foreseeability approach it will be necessary to investigate the cases where the courts have been operating within the indicated philosophy.

The provisions of the first quoted section (a) have been relied upon to justify recovery against a manager of a telephone company who had the duty of inspecting poles when a pole in disrepair fell upon the plaintiff in the street,⁶ to permit plaintiff injured by drinking bad coca-cola to recover against the manager of the plant who had supervised its manufacture,⁷ and to allow recovery by plaintiff who was injured by the explosion of a boiler which defendant had agreed to but failed to properly inspect.⁸ The provisions of the second quoted section (b) have been relied upon to justify recovery by a business guest against an agent in full charge of a building, with discretion as to repairs, who knowing that a door was in bad condition failed to repair it,⁹ by an employee against an agent in charge of a mine who was authorized to, but failed to take precautions against explosion,¹⁰ by a performer against the manager of a theatre having control of

³ RESTATEMENT, AGENCY (1933) § 354.

⁴ RESTATEMENT, AGENCY (1933) § 355.

⁵ RESTATEMENT, AGENCY (1933) § 357.

⁶ *Murray v. Cowherd*, 148 Ky. 591, 147 S.W. 6 (1912).

⁷ *Buffkin v. Grisham*, 128 So. 563 (Miss. 1930).

⁸ *Van Winkle v. Am. Steam Boiler Co.*, 52 N.J.L. 240, 19 Atl. 472 (1890).

⁹ *Baird v. Shipman*, 132 Ill. 16, 23 N.E. 384 (1890).

¹⁰ *Stiewal v. Borman*, 63 Ark. 30, 37 S.W. 404 (1896).

its operation who failed to repair an unprotected switch,¹¹ by an invitee against an agent in charge of an apartment house for failing to repair a catch on the door of an elevator,¹² by a tenant against an agent in charge of a house for permitting a large hole to remain in the walk,¹³ by a plaintiff who was cut by glass which fell out of a window when it was found that the defendant, administrator in charge of an estate, had failed to inspect the building from which the glass fell,¹⁴ by a passerby who was injured by the fall of a roof when defendant agent who was in control of the management of the property, including its improvement and repair, had failed to perform his duties,¹⁵ by the owner of property against a section boss who did not perform his duty of keeping weeds from the track when the weeds were set afire by an engine and the fire burned plaintiff's property,¹⁶ by a tenant against the executive committee of a university having supervision of an office building for injury due to its known defective condition,¹⁷ and by many others under comparable circumstances.¹⁸

An analysis of the above illustrative cases leads to the logical and inevitable conclusion that the courts have been swayed by the foreseeability test. It is apparent that the courts are basing their decisions upon the responsibility of the agent as a reasonably prudent man. The agent has not shouldered extra burdens simply because he is a man who has made a contract with his principal. Rather by reason of having accepted employment the agent has assumed certain responsibilities and duties. He has done so because he is a reasonably prudent man operating in his particular sphere of circumstances. When, for instance, the factual picture reveals that a man has promised his principal that he will make repairs or carefully inspect, he can *foresee* that he has prevented third parties from getting such protection directly from the principal and that damage may be caused if he does not live up to his word or if he negligently acts in respect to his work. In such surroundings justice dictates that we do not allow the agent to throw prudence to the wind and renege on his clearly distinguishable responsibilities.

Such a conception and outlook, when understood and analyzed in connection with the third section (c) quoted from the *Restatement of Agency*,²⁰ contains the germ of explosive possibilities. For once it is

¹¹ Rising v. Ferris, 216 Ill. App. 252 (1919).

¹² Tippecanoe L. and T. Co. v. Jester, 180 Ind. 357, 101 N.E. 915 (1913).

¹³ Carson v. Quinn, 127 Mo. App. 525, 105 S.W. 1088 (1907).

¹⁴ Bannigan v. Woodbury, 158 Mich. 206, 122 N.W. 531 (1909).

¹⁵ Mollino v. Ogden and Clarkson Corp., 243 N.Y. 450, 154 N.E. 307 (1926).

¹⁶ Carter v. Atlantic Coast Line Ry. Co., 84 S.C. 546, 66 S.E. 997 (1908).

¹⁷ Gamble v. Vanderbilt U., 138 Tenn. 616, 200 S.W. 510 (1917).

¹⁸ See note, 16 ORE. L. REV. 175 (1937).

¹⁹ Comment (b), § 357, RESTATEMENT, AGENCY (1933) substantiates such a viewpoint.

²⁰ RESTATEMENT, AGENCY (1933) §357.

admitted, as it apparently has to be, that the language of Section 357 of the *Restatement* (Section c, *supra*) is worded from a foreseeability approach, and that as regards duties to third parties, the agent often takes on the responsibilities of the average prudent man, it seems to this writer that one must inevitably question a rule which absolves from liability an agent who can realize that there is an unreasonable and clearly discernible risk of pecuniary loss to third persons whenever he negligently fails to perform a certain type of duty to his principal. Specifically, it seems strange that magic should be attached to the phrase "pecuniary loss" and that surveyors,²¹ attorneys,²² abstractors,²³ collectors of taxes who give erroneous receipts,²⁴ accountants,²⁵ and recorders,²⁶ should not be accountable to third persons who rely upon their various negligently prepared reports simply because the third person has suffered nothing but pecuniary loss. The way the rule now stands, as set forth by the authors of the *Restatement of Agency*,²⁷ with its emphasis upon non-liability "although the agent realizes that there is an unreasonable risk that such harm will result," it appears that if the outcome is only pecuniary loss to the third party the agent does not have to act as the reasonably prudent man.²⁸ In short it looks as if the phraseology of the rule succeeds in revealing to us a rare, almost freakish character—an agent without reasonable man responsibilities.

It is, of course, true that many of the courts which hold for non-liability when only financial loss has resulted, avoid any mention of the effect of pecuniary loss in handing down their decisions. Many of the tribunals rest the outcome upon the fact that there was no privity between the parties. The fact, however, that many of the same courts disregard the privity rule when another type of loss accrues indicates that they are influenced by the magic attached to the monetary loss fact.

²¹ *Le Lieve v. Gould*, L. R. 1 Q. B. D. 491 (1893).

²² *Savings Bank v. Ward*, 100 U.S. 195 (1879); *Dundee Mtg. and Trust Co. v. Hughes*, 20 Fed. 39 (1884).

²³ *Talpey v. Wright*, 61 Ark. 275, 32 S.W. 1072 (1895); *Symms v. Cutter*, 9 Kan. App. 210 (1900); *Schade v. Gehner*, 133 Mo. 252, 34 S.W. 576 (1896); *Equitable B. and L. Ass'n. v. Bank*, 118 Tenn. 678, 102 S.W. 901 (1907).

²⁴ *Kahl v. Love*, 37 N.J.L. 5 (1874).

²⁵ *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931); *Landell v. Lybrand*, 264 Pa. St. 406, 107 Atl. 783 (1919). Also see note, 24 VA. L. REV. 331 (1938).

²⁶ *Houseman v. Girard M. B. L. Ass'n.*, 81 Pa. St. 256 (1876).

²⁷ *RESTATEMENT, AGENCY* (1933) § 357.

²⁸ It is true that in some of the cases cited *supra*, notes 21, 22, 23, 24, 25, and 26 the court treated the matter as if the agent would never have suspected that the report would be shown to third parties. It seems that such an attitude is not realistic. But, even if the court's view is accepted, it remains that the rule is as stated in § 357 of the *Restatement of Agency*, and the agent is clearly privileged to act in a manner different from that of the reasonably prudent man.

Therefore, since the "pecuniary loss" rule can be established as an important, even if background, tool for framing results, it seems appropriate and the time to come back to the very heart of the thesis of this article, and to point out that the very presence of the "financial loss" rule, with its roots firmly imbedded in a foreseeability atmosphere, seems to be the cause for legal literature and cases in the field under discussion often continuing to be occupied to a large extent with the question as to whether there was a nonfeasance or misfeasance or whether the absence of privity between agent and third party should result in non-liability. For such does continue to be the situation even though some courts have heeded the modern rationalization of Tort law and are no longer primarily concerned with the older distinctions and the question whether the event which caused the harm was an act or a failure to act,²⁹ and even though they have rejected the medieval conception of the necessity of privity between the parties.³⁰

Consequently, even though it can be demonstrated³¹ that many courts reject the privity concept when the agent's act brings about damage to a person or property, it is still true, as the authors of the *Restatement* put it,³² that remnants of the earlier rules exist to such an extent "that the courts' path to a complete rationalization and harmonization of the whole field has many detours."³³ In other words as much day by day litigation occurs in this corner of jurisprudence as in almost any other.

It is not unrealistic to suppose that all the confusion is brought about because many courts have noted the attention paid to foreseeability in stating the rules, and have refused to see any essential distinction between damage to person, property, or pocket-book. Viewing the matter from such a perspective, it is not surprising to find some courts refusing to draw lines and settling the matter under privity doctrines.

For fear that the reader will arrive at a wrong deduction from what has already been written, it seems necessary to make pointedly clear that the writer of this article is not criticizing the non-liability results arrived at through application of the "financial loss" rule. It may be that the advance in Tort law should bring about another conclusion. It is not, however, the purpose of this discussion to go into such matter. The only goal at this time is to raise questions about a rule which puts

²⁹ Tentative Draft, No. 6 RESTATEMENT, AGENCY, 198 (1931).

³⁰ *Supra* note 29, at 199. The proposition is so firmly established as not to require the citation of authority.

³¹ *Supra*, notes 6 to 18 inclusive.

³² *Supra*, note 29 at 199.

³³ *Minnis v. Younker Bros.*, 118 N.W. 532 (Ia. 1908); *Wendland v. Berg*, 188 Ia. 202, 174 N.W. 410 (1920); *Mauer v. Egan*, 182 N.Y.S. 180 (1920); *Kelly v. Chicago and A. Ry. Co.*, 122 Fed. 286 (1903); *Burrechter v. Chicago M. & St. P. Ry. Co.*, 10 F. (2d) 165 (1925); *Potter v. Gilbert*, 115 N.Y.S. 425 (1909).

such emphasis upon foreseeability that consistent courts are impelled to evade the *whole* issue of agent's responsibility by falling back on archaic principles.

As early as 1916 clear and brilliant thinkers saw the inconsistency concealed within the phraseology of the "pecuniary loss" dogma. It was in that year that Professor Warren A. Seavey writing on the "Liability of An Agent in Tort"³⁴ pointed out that the result of non-liability under the above indicated doctrine was placed on grounds of remoteness and justified by analogy with some non-agency cases in the tort field. He pointed out that many of the courts were wrong in their decisions in the tort cases, but remarked that "accepting their reasoning as sound it will not apply to the agency cases, where, since the agent knew the nature of the injury to be suffered and the one³⁵ to be injured, it cannot be said the result was too remote." Then, a few paragraphs later, Professor Seavey remarked, "The language in none of these cases is very convincing and should not be an obstacle to a court which is willing to do more than repeat the formula that for failure to act an agent is liable only to his principal." Again in 1931 the Reporters of the *Restatement of Agency*³⁶ in their explanatory notes set forth in the Tentative Draft³⁷ refer to the "pecuniary loss" rule and state, "This section is another on which the Agency group has considerable doubt as to its correctness."³⁸

In spite, however, of such an utterance the rule was finally adopted by the *Restatement*.³⁹ A question, therefore, naturally comes to the front. Why was the doctrine ultimately approved when so much doubt existed as to its correctness and when it was apparently so contrary to natural logic? The answer to the question will once again focus attention upon the very core of the thesis upon which this discussion rests. It is submitted that perhaps the Reporters were swayed by the feeling that the result was to be desired, but were painfully conscious of the inconsistency involved in disregarding the foreseeability wording of the rule.

The writer is, of course, aware of the reason given by the Reporters—namely that they felt duty bound to state the law as it exists. But the Reporters have not always felt so duty bound to dogmas. Hence, is it fanciful to suspect that until Tort law definitely reaches out to impose new forms of liability, the Reporters are satisfied with the results

³⁴ 1 So. L. Q. 39 (1916).

³⁵ Professor Seavey's latest utterances (note 37, *infra*) would seem to indicate that he would not wish to have the word "one" carry a restricted connotation. He seems willing to allow it to remind of "class."

³⁶ Professor Seavey was the Chief Reporter.

³⁷ 6 Tentative Draft 202 (1931).

³⁸ The same thought is forcibly put in a note in 21 MINN. L. REV. 441 (1937). There it is said, "Finding that there is no duty is incompatible with the thesis that the duty is premised on the foreseeability of injury."

reached under Section 357? Is it not realistic to suppose that their quarrel with the rule is a hedging technique to protect themselves against the charge of inconsistency?

As already remarked, the writer raises no objection to the results reached under the rule. He merely deplores the statement of rules which put emphasis upon foreseeability in situations where conclusions are to be reached which totally ignore the "clear view" reasoning, and he deplores the unevenness of the law which seems to be the direct outgrowth of such approval.

Professor Fred Rodell in his *Woe Unto You, Lawyers* has a lot to say which can be challenged. But the thought comes to mind that some of Professor Rodell's reasoning is valid. It does appear that at times American jurisprudes have been guilty of indirect statement of the law with harmful results. If non-liability is to be the rule in the "financial loss" area, it can be provided for under a rule which would not encourage courts to hide behind outworn principles in order to avoid inconsistency. All that is necessary is to rephrase the philosophy by removing the emphasis from the concept of "clear view."

Justice Cardozo pointed the way in the now famous *Ultramares Corporation v. Touche*⁴⁰ case. In commenting upon the liability of an accountant to a third person for negligence the great New York jurist significantly remarked, "If liability for negligence exists, a thoughtless slip or blunder . . . may expose accountants to a liability in an indeterminate amount . . . The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences." The same thought, although not nearly so forcefully, was expressed by the Kansas court in *Mallory v. Ferguson*.⁴¹

If Cardozo's reasoning is accepted, emphasis would be taken off the "pecuniary loss" fact with its unfortunate attendant stress on foreseeability. Instead, the courts' attention would be directed to the fact that in fields involving high degrees of mental skill, where a slip is always possible, the performer should not be liable to others beyond those with whom he made the contract. The foreseeability element would be subordinated. A defendant would escape liability even though he could foresee results if a mental slip should cause a mistake. He would be extended immunity because the courts could realize that even a skillful man, using a high degree of care, might make a mental error. Of course, if the facts indicated that the mistake was based upon wilful and wanton misconduct rather than a mere mental blunder, it would seem necessary to qualify the rule. Certainly, a statement of philosophy

³⁹ RESTATEMENT, AGENCY (1933) § 357.

⁴⁰ 255 N.Y. 170, 174 N.E. 441 (1931).

⁴¹ 50 Kan. 685, 32 Pac. 410 (1893).

could take cognizance of such possible change in foundation background. At any rate there does seem to be a difference in the seriousness of the negligence involved in the acts of inspecting or repairing and the acts of abstracting or auditing. The man who fails to or carelessly inspects or repairs is probably more culpable than the man who momentarily loses his way in solving a technical mental problem. It may, of course, be said that the accountant or abstractor should assume, as a risk of doing business, liability to third parties. Until, however, Tort law makes such an advance it seems that the courts desire to feel otherwise.

Consequently, a statement of the rule, which puts stress on non-liability because of the lessened responsibility growing out of a mental mistake, will, it is submitted, lead to doing away with much of the confusion which exists. On the one hand, it will permit all courts to depart from the hedging device of the privity concept and find liability in the repair and inspecting situations. On the other hand, it will allow courts to find non-liability in the auditing and abstracting areas. Both conclusions can be arrived at without illogically manipulating the foreseeability rule.

CONCLUSION

It is hoped that this discussion has succeeded in focusing attention upon the fact that great care should be used in formulating rules. Principles should be stated in such lucid terms and in such a direct manner as to insure that their acceptance will not involve an illogical justification for liability or non-liability. The rather obvious illustration used in this discussion for the purpose of bringing out the point does not stand alone. There is a great deal of muddy thinking, based upon the slenderest sort of reasoning, which arises as a direct result of an improper emphasis on some slogan. This very situation, for instance, is responsible for the confusion in the emotional disturbance field.⁴²

The distinguishing earmark of a good statement of legal philosophy should be its success in steering courts away from friction with just and established concepts. The problem and solution suggested in this article was intended to illustrate how such matters can be accomplished. The practical repercussion from such technique should be more uniformity of decision, and the triumph of the idea of justness rather than the emergence of an exception which seems to fly in the very face of an accepted doctrine.

⁴² For a discussion on the point and a rather complete citation of authorities see the author's articles on *Duty and Foreseeability Factors in Fright Cases*, 23 MARQ. L. REV. 103 (1939), and *Insults—Practical Jokes—Threats of Future Harm—How New as Torts?*, 28 KEN. L. J. 411 (1940).

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